DIGEST OF RECENT VIRGINIA DECISIONS.

Supreme Court of Appeals.

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

P. LORILLARD CO., Inc., *v.* CLAY.

Sept. 16, 1920.

[104 S. E. 384.]

1. Appeal and Error (§ 987 (2)*)—Under the Code Case Must Be Considered on Error as Viewed by the Jury.—Formerly a plaintiff in error stood in the position of a demurrant to the evidence, but now, in view of Code 1919, § 6365, the case must be viewed as the jury viewed it, remembering that the jury are the sole judges of the weight of the testimony and also bearing in mind the weight to be given to a verdict approved by the trial judge.

2. Limitation of Actions (§ 127 (5)*)—Amendment Held Not to State a New Cause of Action for Servant's Injuries.—In an action by a servant whose eye was destroyed when the bit of a drill broke, the amendment of the declaration by adding a third count setting up negligence on the part of the master in that the drill was out of repair and was too heavy to use with the bit, held not to state a new cause of action, barred by the statute of limitations.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 330, et seq.]

3. Appeal and Error (§ 1039 (1)*)—Refusal to Permit Filing of Plea of Limitations Held Harmless.—Where an amended count did not state a new cause of action, the refusal of the trial court to permit filing of plea of limitations thereto was harmless.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 330, et seq.]

4. Pleading (§ 85 (2)*)—Court Has Discretion as to Time for Filing Pleading.—The trial court is vested with discretion to refuse plea of limitations not offered in time.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 444.]

5. Trial (§ 28 (2)*)—Propriety of Ordering View Rests Largely in Discretion.—The propriety of ordering a view lies largely in the discretion of the trial court, which should grant it only when reasonably certain that the view will be a substantial aid to the jury in reaching a correct verdict.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 66.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

6. Trial (§ 28 (1)*)—Denial of View Will Not Be Reversed Unless Necessary and Code Is Complied with.—The decision of the trial court denying a view will not be reversed unless the record shows that such view was necessary, and further shows a compliance with Code 1919, § 6013, requiring the party requesting the jury to advance the expense.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 66.]

7. Trial (§ 28 (1)*)—Views Are Not Only to Aid the Jury, But to Afford Additional Source of Proof.—Views are not to be restricted to cases in which they will aid the jury in applying testimony adduced; for there are cases where a view will furnish a distinctly additional source of proof, the thing itself as autoptically observed.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 66.]

8. Trial (§ 28 (1)*)—Refusal of a View Correct Where Conditions Had Changed.—Where it did not appear that conditions in the building where the accident occurred had remained the same during the time between the accident and trial, a view of the premises requested by defendant was properly refused for that reason.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 66, et seq.]

9. Appeal and Error (§ 730 (1)*)—Assignment of Error to Instructions Not Setting Out Evidence Insufficient.—An assignment of error stating that the latter parts of each of three long instructions which were not set out were not supported by the evidence, which failed also to set out the evidence adverting merely to the fact that most of the evidence had previously been set out, is insufficient for consideration by the appellate court, which will review only those errors properly assigned, and will not search the record.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 600, et seq.]

10. Trial (§ 217*)—Instruction That Jury Should Not Be Influenced by Sympathy Properly Refused.—In a servant's personal injury action, instruction that it was duty of the jury to consider the case without being influenced by sympathy or the mere fact that plaintiff was injured, etc., was properly refused; the matter being covered by the oaths of the jurors.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 600, et seq.]

11. Trial (§ 260 (8)*)—Instruction That Drill Was Not Too Heavy for the Work Properly Refused.—In an action by a servant whose eye was destroyed when the bit of an electric drill broke, an instruction that there could be no recovery on the ground that the drill was too heavy for the work on which it was being used was properly re-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

fused, there being evidence that the drill was too heavy for the work, and the matter further being covered by other instructions.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 718, et seq.]

12. Appeal and Error (§ 730 (1)*)—Assignment of Error to Instruction Should Be Specific.—An assignment of error that petitioner submits that an instruction should have been given is too general to merit consideration.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 600, et seq.]

13. Trial (§ 260 (1)*)—The Refusal of Requests Covered by Instructions Given Is Not Error.—The refusal of requested instructions covered by those given, whether they were prepared by the court or by the parties, is not error.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 742, et seq.]

14. Trial (§ 127*)—Reference of Counsel to the Fact Defendant Was Insured Improper.—In a personal injury action, reference by counsel to the fact that the defendant master was insured is highly improper.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 714, et seq.]

15. Trial (§ 1060 (1)*)—Reference to Previous Success of Defendant's Counsel in Personal Injury Actions Harmless.—In a servant's personal injury action, reference by the servant's counsel to the success in previous actions of defendant's attorney was harmless.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 714, et seq.]

16. Trial (§ 114*)—Argument as to What Jurors Would Take for Injury Improper.—In a servant's action for injury causing the loss of an eye, argument by his counsel as to what members of the jury would take for loss of an eye was improper.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 714, et seq.]

17. Appeal and Error (§ 207*)—Unless Objected at Trial, Improper Argument No Ground for Reversal.—Improper argument of counsel is no ground for reversal where no objections at the trial; for, in the absence of objection, the impropriety must be deemed waived, and the trial judge cannot be put in error.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 718, et seq.]

18. Trial (§ 132*)—Improper Argument Which Was Withdrawn Harmless.—In a servant's personal injury action, improper argument of counsel to the effect that the master would reply on the worn-out doctrine of contributory negligence, and that at the present time it

was not a defense, is not ground for reversal, where counsel admitted that he was confused and withdrew the statements.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 714, et seq.]

19. Trial (§ 125 (1)*)—Argument Tending to Array Class against Class Highly Improper.—Argument of counsel in a servant's personal injury action which tended to array labor against capital and asserted that employers found it cheaper to maim employés than to buy proper machinery was highly prejudicial.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 714, et seq.]

20. Trial (§ 106*)—Counsel Should Have Considerable Latitude in Argument.—Considerable latitude should be allowed counsel in argument, and in the ordinary case the discretion and judgment of the trial court ought to be decisive of questions of this kind.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 715, et seq.]

21. Trial (§ 132*)—Argument May Be of Such Impropriety That it Cannot Be Removed by Withdrawal.—While ordinarily the determination of the trial court as to the propriety of an argument is conclusive and will not be disturbed, yet argument of counsel may be of such a nature that the effects cannot be removed by withdrawal.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 714, et seq.]

22. Damages (§ 96*)—Measure for Personal Injury Is for the Jury's Discretion.—There is no rule of law fixing the measure of damages in cases of personal injury, as loss of an eye, but the matter should be left to the sound discretion and judgment of an impartial jury, whose verdict will not be disturbed unless it appears that they have been influenced by partiality or prejudice or have been misled by some mistaken view of the merits.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 187, et seq.]

23. Courts (§ 89*)—Approved Verdicts Furnish Criterion for Damages.—Verdicts approved by the appellate court furnish a sort of standard for the amount of damages for personal injury, as the loss of an eye, and to that extent will govern the idiosyncrasies of a particular jury.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 187, et seq.]

24. Damages (§ 132 (14)*)—$15,000 for Loss of an Eye Reduced to $10,000.—A verdict of $15,000 in favor of a young man about 21 earning $14 a week who lost one eye, but whose earning capacity did not seem to have been depreciated, it appearing that after the accident

he returned to his same work at an increase, must be deemed excessive to the amount of $5,000, though, in view of the decreased purchasing power of money, the verdict will be upheld to the amount of $10,000, though it was double the average verdict for such injuries.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 187, et seq.]

25. Appeal and Error (§ 1151 (2)*)—Appellate Court Can Fix the Amount of Damages.—Where there was no question as to defendant's liability, although the verdict, possibly because of improper argument of counsel, was excessive, the appellate court, instead of reversing the judgment under Code 1919, § 6365, solely for assessment of damages, may determine that issue itself, being in as good a situation as a jury.

[Note.—For editorial comment, see 6 V. L. R., N. S., 619.]

Error to Law and Equity Court of City of Richmond.

Action by Bryan Clay against P. Lorillard Company, Incorporated. Judgment for plaintiff, and defendant brings error. Amended and affirmed.

S. S. P. Patteson and *McGuire, Riely, Bryant & Eggleston,* all of Richmond, for plaintiff in error.

Hundsor Cary, of Richmond, for defendant in error.

JEFFRESS *v.* VIRGINIA RY. & POWER CO.

Sept. 16, 1920.

[104 S. E. 393.]

1. Appeal and Error (§ 362 (2)*)—Where Petition Substantially Points Out Errors, Writ Will Not Be Dismissed.—Although Code 1904, § 3464, Code 1919, § 6346, provides that the petition for writ of error shall assign errors, a writ will not be dismissed on that ground, though the petition did not in specific terms comply with the provision, where it contained a comprehensive discussion of the rulings on evidence and instructions, etc., and the rulings were shown and challenged by separate bills of exception specifically referred to.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 581, et seq.]

2. Electricity (§ 14 (1)*)—Standard of Care Must Be Measured By the Danger.—Where plaintiff asserted that an electric company furnishing him with current was responsible for the firing of his house, it being his contention that at the time fuses were blown out during a storm the transformer was injured and that electric company neg-

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.